91-1300

No. _____

Supreme Court, U.S.
FILED
MAY 1 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

SHARON DUNNIGAN, RESPONDENT

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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SUMMARY OF ARGUMENT

Appellant's Petition for a Writ of Certiorari fails to demonstrate that an inconsistency exists between the various Circuits of the Court of Appeals when the decision of the Fourth Circuit is considered as prohibiting sentence enhancement based solely upon a jury finding a defendant guilty.

In absence of specific findings of perjured testimony by a convicted defendant, the Court of Appeals was compelled to find that the District Court unconstitutionally applied the sentencing guideline enhancement for obstruction of justice.

The appellant's Petition for a Writ of Certiorari should be denied based upon the consistency of the decision of the Fourth Circuit when record and decision in the instant case are compared with the decisions on the issue of enhancing a defendant's sentence for obstruction of justice pursuant to a jury's finding of guilt.

ARGUMENT

THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT'S METHOD OF ANALYSIS AND DECISION IS CONSISTENT WITH THE APPROACH TAKEN BY OTHER CIRCUITS

The government's argument for granting the writ of certiorari in this case is that the Fourth Circuit is in conflict with other circuits on the issue of whether the Constitution prohibits a court from making a sentence enhancement pursuant to United States Sentencing Guideline {3C1.1 if the court finds that the defendant committed perjury. No split exists because the Fourth Circuit's decision was specific to the particular set of facts involved. Thus, the Fourth Circuit's decision should be characterized as entirely consistent with the cases cited by the government to show a split.

This case differs from those cited by the government in support of its theory that there is a split among the circuits. In this case, the sentencing judge based his finding solely on the fact that the jury disbelieved Dunnigan's testimony:

> "This court finds this defendant was untruthful at trial with respect to material matters in this case. The defendant denied her involvement when it is clear from the evidence in this case as the jury found beyond a reasonable doubt that she was involved in the conspiracy alleged in the indictment, and by virtue of her failure to give truthful testimony on material matters that were designed to substantially affect the outcome of the case, the court concludes that the false testimony at trial warrants an upward adjustment by two levels."

Government's Petition at 4, n.l. (emphasis added). This is cryptic language. It does not affirmatively appear that the sentencing judge made an independent finding of perjury. Rather, the judge chose to rely solely upon the jury's disbelief of Dunnigan's testimony. Indeed, the Fourth Circuit based its decision on that assumption, stating in its reversal of the two-point enhancement:

> "Sentencing judges should not indiscriminately treat as a perjurer every convicted defendant who testifies in his own defense. . .Judges must constantly bear in mind that neither they nor jurors are infallible. A verdict of guilty means only that guilt has been proved beyond a reasonable doubt, not that the defendant has lied in maintaining his innocence."

United States v. Dunnigan, 944 F.2d 178, 185 (4th Cir. 1991) (quoting United States v. Moore, 484 F.2d 1284, 1287-88 (4th Cir. 1973))[1]. The fact that the sentencing judge's apparent basis for the two-point enhancement was the mere fact that the defendant testified on her own behalf distinguishes this case from all cases cited by in support of the apparent split as well as United States v. Grayson, 438 U.S. 41 (1978).

In Grayson, the United States Supreme Court held that the sentencing judge properly took into account the fact that he considered the defendant's testimony to be fabricated when he sentenced the defendant. Id. at 55. The sentencing judge in Grayson, however, had made a specific factual finding, independent of the jury's verdict, that the defendant had committed perjury. Id. at 44. Similarly, the sentencing court in each case that is ostensibly in disagreement with Dunnigan made an independent finding of perjury. United States v. Bautista-Polanco, 927 F.2d 14, 22 (1st Cir. 1991) (holding judge could independently gauge credibility of witnesses for purpose of sentence enhancement); United States v. Matos, 907 F.2d 274, 275-76 (2nd Cir. 1990) (affirming enhancement based on perjury committed at suppression hearing); United States v. Acosta-Cazares, 878 F.2d 945, 953 (6th Cir.) (holding enhancement proper when judge believes defendant has committed perjury), cert. denied, 493 U.S. 899 (1989); United States v. Contreras, 937 F.2d 1191, 1993 (7th Cir. 1991) (holding enhancement

[1] But see United States v. Craigo, 956 F.2d 65, 68 (4th Cir. 1992). The record in Craigo also is unclear, but the case appears to interpret Dunnigan as entirely precluding an upward adjustment based on the defendant's testimony, even with an independent finding of perjury. Id.

proper only upon judge's independent finding of perjury)[2]; United States v. Wagner, 884 F.2d 1090, 1098-99 (8th Cir. 1989) (affirming judge's enhancement based on his independent finding of perjury, as well as the jury's guilty verdict)[3], cert. denied, 494. U.S. 1088 (1990); United States v. Barbosa, 906 F.2d 1366, 1369 (9th Cir.) (affirming judge's enhancement based on his finding that the defendant's testimony was "pure fantasy"), cert. denied, 111 S.Ct. 394 (1990); United States v. Beaulieu, 900 F.2d 1537, 1541 (10th Cir.) (affirming enhancement because record showed clearly "that the sentencing judge disbelieved defendant's testimony"), cert. denied, 110 S.Ct. 3252 (1990) (finding sufficient evidence of untruthfulness in the record to merit a two point upward enhancement). Here, by contrast, the sentencing court based its enhancement purely on the fact that Dunnigan testified and that the jury appeared to have disbelieved her testimony. Thus, Dunnigan is entirely consistent with the approach taken by other circuits, as well as that embraced by the Supreme Court in Grayson.

The argument for Dunnigan's consistency is further bolstered by two cases from the First and Seventh Circuits. United States v. Martinez, 922 F.2d 914 (1st Cir. 1991); and United States v. Lozoya-Morales, 931 F.2d 1216 (7th Cir. 1991). In Lozoya-Morales the Seventh Circuit reversed a trial judge's two-point enhancement for obstruction of justice because he failed to make an independent finding of perjury. Lozoya-Morales, 931 F.2d at 1219. The First Circuit reached a similar conclusion in Martinez when it refused to force a trial judge to

[2] See also United States v. Jones, 950 F.2d 1309, 1315-16 (7th Cir. 1991), in which the Seventh Circuit rejected Dunnigan but failed to address whether the judge made an independent finding of perjury. Id.

[3] See also United States v. Ogbeifun, 949 F.2d 1013, 1014 (8th Cir. 1991) (rejecting Dunnigan, but only to the extent that it would prohibit an upward adjustment even with an independent finding of perjury).

make an automatic upward enhancement for obstruction of justice solely on the basis of a jury's guilty verdict after the defendant's testimony in his own defense. Martinez, 922 F.2d at 926.

In its Petition the government contends that United States Sentencing Guideline {3C1.1 does not require an upward adjustment every time a defendant testifies on his own behalf and is convicted and cites Lozoya-Morales and Martinez for that proposition. Government's Petition at 15, n.8. If this case is indeed identical to Lozoya-Morales and Martinez, then it fails even the standard the government itself has conceded, because it does require that the court give every convicted defendant who testifies in his own defense a two point upward adjustment.

In absence of expressed findings of specific perjured testimony, as is the case in this instance, the inevitable conclusion is that the sentencing court perceived the guidelines as mandating the two level enhancement solely upon the jury's verdict of guilty. Likewise, the government asserted during oral argument before the Court of Appeals "...that every defendant who takes the stand and is convicted should be given the obstruction of justice enhancement." Dunnigan, 944 F.2d 178, 183.

The Fourth Circuit was confronted with a sentencing record that simply alluded to perjured testimony and was presented with the government's argument that the enhancement was required for every
convicted defendant who testified had not alternative but to reach the conclusion that the rigidity of the sentencing guidelines could not be used to find an obstruction of justice enhancement.

Although there is detailed recitation of the facts presented

to the jury at the trial, there is no indication in the sentencing record as to which facts the jury believed or disbelieved in the defendant's and the government witnesses' testimony. The absence of those findings presents the possibility that the jury may have believed all or none of the defendant's testimony but still convicted her on a portion of the government's evidence which she did not attempt to address[4] or rebut.

It is important to note that the governments' evidence in its case in chief was solely the testimony of convicted co-conspirators who were testifying in order to earn credit for lenient sentences. There were no drugs, documents, photograph or recordings which would have corroborated their testimony and supported a perjury finding. The only hard evidence in the case came in the form of rebuttal testimony of a collateral crime which was recorded by an informant. The sentencing record made no analysis of the evidence upon which the enhancement was based and compelled the Court of Appeals to render an admonition against mechanistic application of the sentencing guidelines as advocated by the government during oral argument.

The deficient record and findings by the sentencing court renders this case inappropriate for consideration by this Court for a determination of the important issue of the constitutionality of the obstruction of justice enhancement for perjured testimony at trial.

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[4] The Court of Appeals in its review of the evidence characterized Dunnigan's testimony as a denial of everything. U.S. v. Dunnigan, 944 F.2d 178,181.

CONCLUSION

The lack of clarity of the record and the apparent consistency of the decision by the Fourth Circuit with the application of the obstruction of justice sentence enhancement provisions compels that Certiorari be denied by this Court.

Respectfully submitted,

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